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### SUMMARY

GTE Service Corporation, on behalf of its individual business units, supports continuation of the Commission's policy of tariff forbearance for those common carriers not deemed to be dominant. Tariff forbearance has served the public interest and has achieved its pro-competitive objectives since its implementation in 1982-83. It has reduced regulatory costs and delay in pricing and service innovations by carriers not deemed to be dominant and has made it possible for subject carriers to design offerings for customers based on consumers' specific demands.

Tariff forbearance for carriers not deemed to be dominant is within the Commission's authority under Section 4(i) of the Communications Act since it promotes the purposes of the Act as set forth in Section 1. Accordingly, such tariff forbearance is taken "under the authority" of the Act within the meaning of Section 203(c). Further, the Commission's permissive tariff forbearance policy is an appropriate use of its authority under Section 203(b)(2) to "modify" any requirement of Section 203 by general order applicable to special circumstances. Unlike mandatory detariffing of common carriers, it is not a wholesale abandonment or elimination of the tariff filing requirement. In addition, Sections 211 and 219 both provide authority for allowing the Commission to permit carriers to provide service to non-carrier customers pursuant to contracts rather than tariffs.

The Supreme Court decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990) does not

undermine the Commission's authority to forbear from requiring carriers not deemed to be dominant to file tariffs. That decision is based upon the "filed rate doctrine." Under that doctrine, carriers who offer services pursuant to tariffs may charge customers only the filed tariff rates for those services. They can not deviate from those rates for any reason -- even where there are equitable considerations. Regulatory commissions do not have the authority to permit carriers to deviate from the filed rates. The filed rate doctrine applies whether tariffs are mandatory or permissive. Neither Maislin nor other cases based upon the filed rate doctrine preclude the Commission from forbearing from requiring certain carriers to file tariffs where there exists statutory bases for such tariff forbearance.

The Telephone Operator Consumer Services Improvement Act of 1990 provides further statutory support for the Commission's tariff forbearance policy. By requiring certain carriers otherwise subject to tariff forbearance to file "informational" tariffs with the Commission, Congress recognized that those carriers had been lawfully relieved of their obligation to file tariffs under Section 203 of the Act.

Accordingly, GTE Service Corporation concludes that the Commission's tariff forbearance policy is lawful, that it has served the public interest since its inception, and that it should be retained.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of the Secretary

In the Matter of )  
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Tariff Filing Requirements for )  
Interstate Common Carriers )  
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CC Docket No. 92-13

COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation ("GTE"), on behalf of its affiliated satellite and cellular service companies, hereby submits its initial comments in the above-captioned proceeding.

On January 29, 1992, the Commission released a notice of proposed rulemaking commencing this proceeding.<sup>1/</sup> By this Notice, the Commission solicits public comment on a series of enumerated issues regarding its "forbearance" policy. Under the Commission's forbearance policy, certain common carriers classified as "non-dominant" in their provision of interstate service are not required to file tariffs as seemingly directed by Section 203(a) of the Communications Act of 1934, as amended.<sup>2/</sup> GTE's business units include several entities that have been classified as non-dominant carriers or have otherwise not been deemed to be dominant and are therefore not required to file tariffs. These entities include GTE Spacenet Corporation and GTE

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<sup>1/</sup> Tariff Filing Requirements for Interstate Common Carriers (Notice of Proposed Rulemaking), FCC 92-35 (hereinafter "Notice" or "NPRM").

<sup>2/</sup> 47 U.S.C. §203(a) (1991) (hereinafter "Communications Act" or "Act").

Federal Systems, both of which provide domestic fixed-satellite services, as well as GTE Mobilnet, Incorporated and Contel Cellular, Inc., which offer cellular services. These companies provide their services in conformance with all applicable regulatory requirements.

For reasons which will be discussed in these comments, GTE believes that the Commission's carefully-crafted forbearance policy has served the public interest, has achieved the objectives which underlaid its adoption in 1982, and conforms fully with the Communications Act. Accordingly, GTE respectfully urges the Commission to retain its tariff forbearance policy as an integral component of its scheme for the effective regulation of those common carriers not deemed to be dominant.

#### INTRODUCTION

Tariff forbearance has its genesis in the Commission's Competitive Common Carrier Rulemaking Proceeding (Docket No. 79-252) commenced in 1979.<sup>3/</sup> In a series of reports and orders issued in that proceeding, the Commission significantly changed the regulatory requirements applicable to non-dominant interstate common carriers (i.e., carriers without market power). The goal of the Commission in this proceeding was to promote the efficient functioning of the marketplace by

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<sup>3/</sup> Policy and Rules Concerning the Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Notice of Inquiry and Notice of Proposed Rulemaking), 77 FCC2d 308 (1979) (hereinafter "NOI/NPRM").

reducing regulatory burdens where possible and consistent with the purposes of the Communications Act.

Initially, the Commission adopted "streamlined" regulations governing tariffs and Section 214 applications of non-dominant carriers.<sup>4/</sup> However, in its NOI/NPRM, the Commission noted that regulation of non-dominant carriers -- even streamlined regulation -- might impose wasteful costs on those carriers and ultimately on consumers. Thus, the Commission suggested that it might be lawful to reduce or even to eliminate the unnecessary and costly tariff regulation of competitive firms.<sup>5/</sup> In that 1979 NOI/NPRM, the Commission proposed and sought public comment on two alternative theories for reduction or elimination of those regulatory requirements. One theory, the "forbearance approach," was premised on the notion that the Commission had the statutory authority to forbear from subjecting certain common carriers to certain of the Act's provisions where it had a principled basis for doing so. The other theory, the "definitional approach," sought to define "common carrier" in a manner which would exclude from the Act's requirements those carriers without market power.

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4/ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (First Report and Order) 85 FCC2d 1 (1980). Under streamlined regulation, carriers are permitted to file tariffs on short (i.e., fourteen day) notice, they are relieved of the cost support and rate justification requirements applicable to dominant carriers, and their rates are presumptively lawful.

5/ NOI/NPRM, supra, 77 FCC2d at 359.

The Commission never embraced the definitional approach. However, it did conclude that it had the authority to forbear from applying certain provisions of the Act to nondominant carriers.<sup>6/</sup> As a result, since 1982-1983, non-dominant carriers have been allowed to offer their services either pursuant to tariffs or pursuant to non-tariffed arrangements (e.g., contracts).

In considering the lawfulness of tariff forbearance nearly thirteen years after it was first proposed and a decade after its initial implementation, it is useful to review the circumstances which motivated the Commission to pursue that policy. Neither streamlined regulation nor regulatory forbearance was the result of efforts by competitive carriers to reduce their regulatory costs or to obtain advantages over carriers subject to dominant carrier regulation. Rather, the impetus for these tariff regulatory policies emanated from the Commission itself, which perceived, even in the early days of telecommunications competition, that regulatory requirements -- especially tariff requirements -- were being used by the competitive carriers against each other as competitive tools,

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6/ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Second Report and Order), 91 FCC2d 59 (1982) (application of forbearance to domestic terrestrial resale carriers); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fourth Report and Order), 95 FCC2d 554 (1983) (application of forbearance to other domestic non-dominant carriers).

thereby delaying and sometimes depriving consumers of the benefits of competition. In its 1979 NOI/NPRM, the Commission discussed how application of tariff filing requirements to non-dominant carriers was stifling competition, stating as follows:

In addition to the costs such regulation itself imposes, our recent experience has shown that the OCCs' [other common carriers] efforts to implement innovative services and pricing often have been impeded by petitions to reject or suspend their tariff filings. These petitions usually are filed by carriers offering comparable or competitive services. Indeed, the records of our Common Carrier Bureau reveal that approximately three-quarters of the petitions to reject or suspend filings of OCCs come from competing carriers, and not customers. . . In many, if not most, cases, it is apparent that these petitions are being used by competitors as a dilatory tactic to postpone commencement of service or rate changes by competing carriers.<sup>7/</sup>

In adopting tariff forbearance for the first time in 1982, the Commission concluded that "traditional tariff regulation" of non-dominant carriers would inhibit price competition, service innovation, and the ability of firms to respond quickly to market trends.<sup>8/</sup> Thus, the Commission's tariff forbearance policy was intended to promote pricing and service innovation by competitive firms as well as to reduce those firms' ability and incentives to utilize tariff regulation as a means to retard the development of competition.

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7/ NOI/NPRM, supra, at 313-314 (emphasis added).

8/ Second Report and Order, supra, 91 FCC2d at 65.

During the intervening ten years since the Commission first elected to forbear from applying tariff filing requirements to non-dominant carriers, it has become apparent that the Commission's 1979 assessment of the impact of tariffs on competition in telecommunications markets was correct. Events of the past decade have demonstrated that tariff forbearance has had its intended pro-competitive effect. Today, there are at least four hundred non-dominant carriers that offer interstate telecommunications services. These include specialized carriers, resellers (switch-based and switchless), satellite service providers, and others. Very few of these carriers file tariffs with the Commission. The Commission's forbearance policy has facilitated these carriers' efforts to compete with each other in the appropriate arena -- the marketplace -- rather than in protracted tariff battles before the Commission.

Not only has the number of carriers competing in interstate markets increased dramatically, the variety of services has grown beyond even the Commission's expectations in 1979. For example, services such as the customer premises small earth station (including VSAT) services of GTE Spacenet and other domestic satellite carriers were not even under development in 1979. These and other services are currently available on a competitive basis only.<sup>9/</sup>

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<sup>9/</sup> In view of the specialized nature of certain of these services, it may also be appropriate for these carriers to offer them on a private carrier or other non-common carrier basis.

Tariff forbearance has made it possible for consumers to negotiate directly with service providers and for carriers to tailor offerings to specific customers based upon each customer's needs and wants. In short, forbearance has enhanced carriers' ability to become more responsive to consumer demands. Because of the competitive nature of these offerings and the absence of market power of carriers not deemed to be dominant, their services have been available subject to rates and conditions which are just and reasonable and which are not unreasonably discriminatory, within the parameters of Sections 201(b) and 202(a) of the Act.<sup>10/</sup>

THE COMMUNICATIONS ACT EMPOWERS THE COMMISSION  
TO FORBEAR FROM REQUIRING NON-DOMINANT  
CARRIERS TO FILE TARIFFS

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The threshold question raised by the Notice is one of law -- whether the Commission has the authority under Sections 4(i) and 203 and other provisions of the Communications Act to continue to permit non-dominant carriers not to file tariffs.<sup>11/</sup> As will be discussed in the following sections of these comments, the Act affords the Commission the requisite authority to continue its policy of tariff forbearance for carriers not deemed to be dominant.

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<sup>10/</sup> 47 U.S.C. §§ 201(b) and 202(a) (1991).

<sup>11/</sup> Notice, supra, at para. 8(a).

- A. Section 4(i) Authorizes the Commission to Forbear from Requiring Tariffs to be Filed by Carriers Not Deemed to be Dominant Where Such Forbearance Promotes the Purposes of the Act
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Section 4(i) of the Act<sup>12/</sup> states as follows:

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act as may be necessary in the execution of its functions.

This is the Commission's "necessary and proper" clause.<sup>13/</sup> As the court in North American Telecommunications Association stated:

Section 4(i) empowers the Commission to deal with the unforeseen, even if it means straying a little way beyond the apparent boundaries of the Act, to the extent necessary to regulate effectively those matters already within its boundaries.<sup>14/</sup>

The emergence of many competitive carriers without the attributes of dominant carriers -- no apparent bottleneck facilities and little or no market power -- was not foreseen at the time of passage of the Communications Act. Yet the genius of the Act is that it affords the Commission sufficient regulatory

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<sup>12/</sup> 47 U.S.C. §154(i) (1991).

<sup>13/</sup> North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).

<sup>14/</sup> 772 F.2d. at 1292.

tools to adopt its regulatory approaches to unforeseen circumstances.<sup>15/</sup> Section 4(i) is one of those tools.

The scope of the Commission's authority under Section 4(i) is not unlimited. The Commission cannot rely upon that section to adopt rules and policies that contravene the Act's provisions. Moreover, the Commission's reliance upon Section 4(i) is limited to actions necessary to performing its functions under the Act or promoting the Act's purposes.

Tariff forbearance for those carriers not deemed to be dominant is fully consistent with the Act's purposes. Those statutory purposes are set forth at Section 1 which states, in pertinent part, as follows:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .<sup>16/</sup>

Since the Commission's inception, efficiently-provided services and reasonable charges for communication services have been critical aspects of the Commission's public interest mandate from Congress. Non-dominant carrier tariff forbearance was

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<sup>15/</sup> See American Airlines v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966) where Judge Friendly noted that, "It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in light of experience."

<sup>16/</sup> 47 U.S.C. § 151 (1991).

intended by the Commission to promote those statutory purposes, i.e., to bring about more efficient provision of service. By eliminating the costs and inevitable delay in availability of new services and competitive pricing, tariff forbearance has indeed promoted service efficiency and reasonable charges. Thus, non-dominant carrier forbearance has furthered the statutory purposes of the Act.<sup>17/</sup> Based upon the record established in the Competitive Common Carrier proceeding, the Commission had an ample basis for determining that forbearance from subjecting carriers not deemed to be dominant to Title II tariff regulation would promote the purposes of the Act. Such regulatory forbearance has been found to be a lawful exercise of the Commission's authority.<sup>18/</sup>

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<sup>17/</sup> Such success may be strong evidence that the Commission should consider extending streamlined regulation to dominant carrier filings where competitors today use the tariff filing process in the manner described at p. 5, supra.

<sup>18/</sup> See Computer and Communications Industry Association, et al v. FCC, 693 F.2d 198, 210-212 (D.C. Cir. 1982), cert. den. 461 U.S. 938 (1983). In that case, the court approved the Commission's forbearance from imposing Title II regulation on enhanced services and customer premises equipment offered by dominant carriers. That approval was based upon the Commission's substitution of "other regulatory tools." (693 F.2d at 212). In the instant case, the "other regulatory tools" include competition, ease of entry and exit and most of the remainder of Title II regulation. Thus, tariff forbearance is a lesser exercise of the Commission's forbearance authority than that affirmed by the CCIA court since, unlike the situations with enhanced services and customer premises equipment, most of Title II remains applicable to those common carriers subject to tariff forbearance.

B. Section 203 Provides Additional  
Authority for Permissive Tariff  
Forbearance for Non-dominant Carriers

As set forth above, the Commission has ample authority under Section 4(i) to forbear from requiring carriers not deemed to be dominant from filing tariffs where it has concluded that such tariff forbearance would promote the purposes of the Act. However, the statutory basis for forbearance is not limited to Section 4(i). There is ample authority within Title II of the Act for tariff forbearance, notwithstanding the recent challenge to forbearance brought about by AT&T's complaint against MCI.<sup>19/</sup>

The obligation of common carriers to file tariffs is codified at Section 203(a) of the Act. That section states, in relevant part, as follows:

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . .<sup>20/</sup>

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<sup>19/</sup> AT&T Communications v. MCI Telecommunications Corporation (File No. E-89-287), FCC 92-36, released January 28, 1992. In that complaint, AT&T alleged that MCI's provision of service to certain customers at rates not contained in MCI's tariffs violates Section 203(a) of the Act. Apparently, the purpose underlying AT&T's complaint was to produce regulatory parity for AT&T since MCI is subject to tariff forbearance and AT&T is not. GTE takes no position at this time as to which carriers should be subject to forbearance, only that the Commission has the authority under the Act to forbear from requiring certain carriers to file tariffs so long as such forbearance advances the purposes of the Act.

<sup>20/</sup> 47 U.S.C. § 203(a) (1991).

Although Section 203(a), on its face, applies to every common carrier, the breadth of that tariff filing obligation must be evaluated in light of the entirety of Section 203 and of the Act itself. This includes Sections 203(b) and 203(c). Section 203(b) affords the Commission substantial latitude to modify any of the requirements of Section 203, including the tariff filing requirement. Specifically, Section 203(b)(2) states as follows:

The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph<sup>21/</sup> (1) to be more than one hundred and twenty days.

It is clear that Section 203(b)(2) empowers the Commission to modify any requirement of Section 203 either in specific instances or by general order applicable to special circumstances. The tariff filing requirement is a Section 203 requirement and, like all other Section 203 requirements, it may be modified by the Commission in accordance with Section 203(b)(2).

This power to modify any requirement of Section 203, including the tariff filing requirement, is not foreclosed by the decision of the United States Court of Appeals for the District of Columbia Circuit in MCI Telecommunications Corporation v.

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<sup>21/</sup> 47 U.S.C. § 203(b)(2) (1991) (emphasis added).

FCC.<sup>22/</sup> In that case, the court vacated and remanded to the Commission the Sixth Report and Order in the Competitive Common Carrier proceeding.<sup>23/</sup> In the Sixth Report and Order, the Commission had determined that non-dominant carriers would no longer be allowed to file tariffs and it directed all such carriers to cancel their tariffs. The court rejected the Commission's argument that its prohibition against non-dominant carriers' filing tariffs was a "modification" within the meaning of Section 203(b)(2). Rather, the court concluded that mandatory detariffing was a "wholesale abandonment or elimination of a requirement."<sup>24/</sup>

Unlike the mandatory detariffing requirement found unlawful by the court in MCI, permissive tariff forbearance is not such a wholesale abandonment or elimination of a requirement.<sup>25/</sup> Under the Commission's tariff forbearance policy, no non-dominant carrier is forbidden from filing tariffs. Those carriers that wish to offer their services subject to tariffs may do so. No carrier is precluded from doing what Section 203 says

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<sup>22/</sup> 765 F.2d 1186 (1985).

<sup>23/</sup> Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 99 FCC2d 1020 (1985).

<sup>24/</sup> 765 F.2d at 1192.

<sup>25/</sup> The MCI court declined to reach the question of the lawfulness of permissive detariffing of non-dominant carriers. MCI v. FCC, supra, 765 F.2d at 1196. However, as discussed in these comments, there is ample support in the Act for such permissive tariff forbearance.

it shall do -- file a tariff. Rather, the Commission has merely modified the tariff filing requirement of that Section "by general order applicable to special circumstances." The general orders are the Second Report and Order and the Fourth Report and Order. The special circumstances are the absence of market power and resulting inability to price above cost of all carriers subject to forbearance.<sup>26/</sup>

Section 203(c) affords the Commission additional authority for allowing non-dominant carriers to provide service without filing tariffs with the Commission. That section prohibits carriers "unless otherwise provided by or under authority of this Act" from engaging or participating in "such

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<sup>26/</sup> In American Telephone and Telegraph Company v. FCC, 487 F.2d 865 (2d Cir. 1973), the court held that the modification authority of Section 203(b)(2) is limited to Section 203 requirements and could not be used to circumvent statutory obligations created by other sections of the Act (for example, requirements created by Sections 204 and 205). The Commission never has attempted to circumvent other statutory requirements through its tariff forbearance policy. It has consistently stated that carriers subject to tariff forbearance remain fully subject to other provisions of the Act, including the just and reasonable standard of Section 201(b), the nondiscrimination provision of Section 202(a), and the complaint procedure codified at Section 208.

In limiting Section 203(b)(2) modifications to the requirements of Section 203, the Second Circuit in the AT&T case stated that, under Section 203(b), the Commission could only modify requirements as to the form of, and information contained in, tariffs, and the thirty days notice provision. 487 F.2d at 879. However, that interpretation is overly narrow. Those requirements are all contained in Section 203(b) whereas the modification provision of Section 203(b)(2) applies to all of Section 203, including the tariff filing requirement of Section 203(a).

communication unless schedules [tariffs] have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder."<sup>27/</sup> In weighing the significance of Section 203(c), the key statutory language is "under the authority of this Act." Such authority is contained in the Section 203(b)(2) "modification" provisions, Section 4(i) and in certain other provisions of the Act which, as discussed below, empower the Commission to permit carriers to offer their services pursuant to contract rather than filed tariffs. Thus, Section 203(c) provides an additional legal basis for the Commission's permissive tariff forbearance policy.

C. The Communications Act Contemplates  
Provision of Common Carrier Services  
to Non-Carrier Customers Pursuant to  
Contracts as well as Tariffs

The Communications Act explicitly recognizes that common carriers may, in some instances, provide services to customers in accordance with contracts rather than tariffs. For example, Section 211(a)<sup>28/</sup> requires carriers to file with the Commission copies of "all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act . . . ." Clearly, Section 211(a)

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<sup>27/</sup> 47 U.S.C. §203(c) (1991).

<sup>28/</sup> 47 U.S.C. §211(a) (1991).

authorizes common carriers to provide services to other carriers pursuant to contract.<sup>29/</sup>

While Section 211(a) is expressly applicable to contracts between carriers, Section 211(b) is not so limited. That section states as follows:

The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting such minor contracts as the Commission may determine.<sup>30/</sup>

The words "any other" prior to the word "contracts" in Section 211(b) refer back to Section 211(a) and encompass those contracts not referenced in that section (i.e., contracts other than those between carriers). It would make no sense for the Act to empower the Commission to require the filing of "any other contracts" if the Commission lacked the authority to allow carriers to enter into contracts other than those contemplated by Section 211(a). Since Section 211(b) describes the filing of "any other contracts" (emphasis added) and does not in any way suggest that contracts with non-carrier customers are somehow prohibited, Section 211(b) arguably contemplates the existence of contracts for service with non-carrier customers. As such, Section 211(b) provides additional support for the notion that the tariff filing requirement of the Communications Act is not absolute.

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<sup>29/</sup> See Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. den. 422 U.S. 1026, reh. den. 423 U.S. 886 (1975).

<sup>30/</sup> 47 U.S.C. § 211(b) (1991) (emphasis added).

There has been virtually no appellate review of the Commission's authority to permit carriers to provide service to non-carrier customers pursuant to contract rather than tariff. However, in American Broadcasting Companies, Inc. v. FCC,<sup>31/</sup> the Court of Appeals for the District of Columbia Circuit recognized that Section 211(b) "arguably may authorize the Commission to provide for the filing of contracts" between carriers and customers.<sup>32/</sup> At the time of that decision, the Commission had not yet attempted to exercise its authority under Section 211(b) to allow carrier-customer contracts in lieu of tariffs. Now it has done so.

Further support for the proposition that Section 211(b) contemplates carrier to customer contracts is provided by the legislative history of that section. In testimony on the proposed Act before the Senate Committee on Interstate Commerce, E.O. Sykes, Chairman of the Federal Radio Commission (predecessor to the Commission) stated as follows:

Many contracts are and will be made by carriers with persons other than carriers in relation to matters which may be investigated under the authority conferred upon the Commission by the act.<sup>33/</sup>

Rates and service conditions are among the matters

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<sup>31/</sup> 643 F.2d 818 (D.C. Cir. 1980).

<sup>32/</sup> Id., at 823 (emphasis original).

<sup>33/</sup> Senate Hearings Before the Committee on Interstate Commerce on S. 2910, 73 Cong., 2d Sess. (1934), at 39.

which the Commission is authorized by the Act to investigate.<sup>34/</sup> Since the Commission has the authority under the Act to investigate rates charged by carriers, it has the authority under Section 211(b) to require that contracts with "persons other than carriers" containing rates be filed. Implicit in that authority is the authority to permit carriers to enter into such contracts with non-carrier customers.<sup>35/</sup>

Unlike the Communications Act, the Interstate Commerce Act, upon which the former act is, in many respects, modeled, contains no comparable provisions contemplating provision of common carrier service pursuant to contract.<sup>36/</sup> Thus, the Commission's policy of tariff forbearance which allows non-dominant carriers to offer their services on a contract, rather than a tariff basis, is fully consistent with the Act.

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<sup>34/</sup> 47 U.S.C. §204 (1991).

<sup>35/</sup> Section 219(a) of the Act provides additional authority for the Commission to permit carriers to provide services pursuant to contract rather than tariff. That section authorizes the Commission to require carriers to report certain information, including information "in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same." There would have been no reason for Congress to have authorized the Commission to require carriers to submit information about contracts affecting charges for their services if the Commission did not have the authority to allow carriers to provide services pursuant to such contracts in the first place.

<sup>36/</sup> The Interstate Commerce Act does recognize the concept of contract carriage and allows certain carriers to provide contract carrier -- as distinguished from common carrier -- services on a contractual basis. See p. 21, infra.

D. The Commission's Tariff Forbearance  
Policy is not Foreclosed by the  
Supreme Court's Maislin Decision

In the Notice, the Commission identifies the 1990 opinion of the United States Supreme Court in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990), as a possible impediment to retention of the Commission's tariff forbearance policy.<sup>37/</sup> However, the holding in Maislin does not foreclose tariff forbearance. Maislin is based upon the "filed rate doctrine." Under that doctrine, common carriers who offer their services pursuant to filed tariffs may charge their customers only the rates contained in their filed tariffs. They may not deviate from those filed rates, irrespective whether the deviation is intentional (e.g., by a private agreement to charge another rate) or unintentional (e.g., by accidentally quoting an incorrect rate to a customer). Nothing in Maislin precludes an agency from permitting carriers to offer service without filing tariffs where the agency has statutory authority to do so.

In Maislin, a bankruptcy trustee of a motor common carrier had attempted to collect from a customer of the carrier an amount representing the difference between the common carrier's tariff rates filed with the Interstate Commerce Commission ("ICC") and lower rates which had been privately negotiated between the carrier and the customer and which had been paid by the customer. The ICC had determined that it would

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<sup>37/</sup> Notice, supra, at para. 6.

be an unreasonable practice for a carrier to negotiate rates lower than those reflected in its tariff for the same service, accept payment of the lower rates, and then demand additional payment of the higher, tariffed, rates.<sup>38/</sup> The Supreme Court held that, irrespective of any hardship that payment of the difference would cause the customer who had negotiated and had paid the lower rates, the "filed rate doctrine" governed.

Clearly, Maislin and the previous filed rate doctrine cases cited therein hold that where carriers are required to file tariffs, they may only charge the rates contained in those tariffs. However, Maislin does not address whether, under the Communications Act (in contradistinction to the Interstate Commerce Act), all common carriers are required to file tariffs. Stated simply, there is a difference between requiring carriers filing tariffs to charge customers the filed rates -- and only the filed rates -- on the one hand, and forbearing from requiring carriers to file tariffs, on the other hand.

As described in the preceding sections of these comments, the Communications Act expressly affords the Commission authority to "modify" the tariff filing requirements for common carriers not deemed to be dominant and to allow such carriers to provide service pursuant to contract rather than tariffs. In contrast, the Interstate Commerce Act does not bestow such authority on the ICC. However, as noted by the Supreme Court in

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<sup>38/</sup> 110 S. Ct. at 2764.

Maislin, the Interstate Commerce Act does authorize the ICC to allow motor carriers to operate as common carriers and as contract carriers.<sup>39/</sup> Section 10761(b) of the Interstate Commerce Act authorizes the ICC to relieve contract carriers from the tariff filing requirements of that act. Under the Interstate Commerce Act, a motor contract carrier is specifically defined as one which transports property under exclusive arrangements with a shipper. No provision of the Interstate Commerce Act permits the ICC to relieve common carriers from filing tariffs and from charging the tariffed rates.

The carrier in Maislin had operated as a common carrier, not a contract carrier, and was therefore subject to the mandatory tariff filing provisions applicable to motor common carriers. The ICC has never purported to relieve common carriers from filing tariffs as required by the Interstate Commerce Act. The ICC merely had held that common carriers filing tariffs should not have to adhere to the tariff rate in all cases.<sup>40/</sup>

A reasonable reading of Maislin and other "filed rate doctrine" cases is that carriers filing tariffs shall not deviate from the tariffed rates. That doctrine would hold whether the filing of tariffs was mandatory or permissive as with carriers subject to tariff forbearance. Indeed, in a post-Maislin case

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<sup>39/</sup> 110 S.Ct. at 2769, 49 U.S.C. 10102(15) (1991).

<sup>40/</sup> 110 S. Ct. at 2763, quoting from NITL - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 ICC 2d 99, 106 (1986).